171

(2)

No. 10-108

Supreme Court, U.S.
FILED
SEP 20 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

DONALD LEE KING and TINA MARIE KING,

Petitioners,

v.

PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION

ALBERT M. PEARSON, III*
MORAITAKIS, KUSHEL, PEARSON & GARDNER
3445 Peachtree Road, Suite 425
Atlanta, Georgia 30326
(404) 261-0016
apearson@mkpglaw.com

PHILLIP L. HARTLEY
HARBEN, HARTLEY & HAWKINS, LLP
Wachovia Center, Suite 750
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
(770) 534-7341

HARRY W. BASSLER
CRIM & BASSLER
100 Galleria Parkway, Suite 1510
Atlanta, Georgia 30339
(770) 956-1813

Attorneys for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine.

2. Whether Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell*.

3. Whether Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), Should Be Reached by this Court and Whether, in Any Event, the Court of Appeals of Georgia Misapplied *Heller* on this Record.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

JURISDICTION 4

REASONS FOR DENIAL OF THE WRIT 4

I. Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine 4

II. Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell* 13

A. Petitioners Failed to Prove that Pioneer Was Administratively Responsible Under *Monell* for Any Policy, Custom or Practice in Effect in the Alpine Program 15

B. No Proof Pioneer Had Actual or Constructive Notice of Any Facts Indicating that Alpine Students Were At Risk of Suicide, that the Use and Monitoring of the Timeout Room Was Improper or that Alpine Employees Were Inadequately Trained 20

TABLE OF CONTENTS – Continued

Page

C. No Proof That Jonathan's Death Was Due to a Constitutional Violation Committed by Alpine's Employees or Was Otherwise Caused by Pioneer's Deliberate Indifference 23

III. Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) Should Not Be Reached by this Court; In Any Event, the Court of Appeals of Georgia Did Not Misapply *Heller* on this Record 29

CONCLUSION 32

APPENDIX

U.S. Department of Justice National Institute of Corrections Prison Suicide: An Overview and Guide to Prevention Table 2-1 ..... App. 1

Chart of Georgia Regulations Governing Seclusion and Time Out ..... App. 3

Remittitur ..... App. 5

Alpine Program – Instructions for the Timeout/Seclusion Documentation Form ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Abellera v. Williamson, 274 Ga. 324, 553 S.E.2d 806 (2001) 14

Adamson v. General Electric Co., 303 Ga. App. 741, 694 S.E.2d 363 (2010) 32

Brandvain v. Ridgeview Institute, Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988) 27

California v. Rooney, 483 U.S. 307 (1987) 13

City of Canton v. Harris, 489 U.S. 378 (1989) 20

City of Gainesville v. Dodd, 275 Ga. 834, 573 S.E.2d 369 (2002) 14

City of Los Angeles v. Heller, 475 U.S. 796 (1986) ..... *passim*

Corley v. Northcoast Behavioral Healthcare Sys., 2004 WL 2521294 (Ohio Ct.Cl. Oct. 6, 2004) 27

DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) ..... *passim*

Dolihite v. Maughon By and Through Videon, 74 F.3d 1027 (11th Cir. 1996) 27

Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) 2

D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) 2

TABLE OF AUTHORITIES – Continued

Page

Estate of Amergi ex rel. Amergi v. Palestinian Authority, 611 F.3d 1350 (11th Cir. 2010) 32

Fulton-DeKalb Hosp. Auth. v. Walker, 216 Ga. App. 786, 456 S.E.2d 97 (1995) 11

Gish v. Thomas, 516 F.3d 952 (11th Cir. 2008).....27

Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998) 21

Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006) 21

Hasenfus v. LaJeunesse, 175 F.3d 68 (1st Cir. 1999) 2

Hope v. Pelzer, 536 U.S. 730 (2002) 25

Hunt v. Thomas, 296 Ga. App. 505, 675 S.E.2d 256 (2009) 11

J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990) 2

King v. Pioneer Reg'l Educ. Serv. Agency, 301 Ga. App. 547, 688 S.E.2d 7 (2009).....*passim*

Leon v. Monterrey Mexican Restaurant of Wise, Inc., ___ S.E.2d ___, 2010 WL 2758599 (Ga. App., Jul. 14, 2010) 11

Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992) 2

Miranda v. Fulton-DeKalb Hosp. Auth., 284 Ga. App. 203, 644 S.E.2d 164 (2007) 27

Monell v. City Dep't of Social Services, 436 U.S. 658 (1978).....*passim*

TABLE OF AUTHORITIES – Continued

Page

N. Ga. Reg'l Educ. Serv. Agency v. Weaver, 272 Ga. 289, 527 S.E.2d 864 (2000) 16, 18

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).....19

Priester v. Lowndes County, 354 F.3d 414 (5th Cir. 2004).....2

Rhyne v. Henderson County, 973 F.2d 386 (5th Cir. 1992).....20

Smith v. Guilford Bd. of Educ., 226 Fed. Appx. 58 (2d Cir. 2007).....2

Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999) 2

Stembridge v. State of Georgia, 343 U.S. 541 (1952).....13

Stevenson ex rel. Stevenson v. Martin County Bd. of Educ., 3 Fed. Appx. 25 (4th Cir. 2001).....2

West v. Tillman, 496 F.3d 1321 (11th Cir. 2007).....21

Whitt v. Stephens County, 236 Fed. Appx. 900 (5th Cir. 2007) 27

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).....14

Wyke v. Polk County Sch. Bd., 129 F.3d 560 (11th Cir. 1997).....2

Yellow Horse v. Pennington County, 225 F.3d 923 (8th Cir. 2000) 27

Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562 (1977).....11, 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257(a) 4

42 U.S.C. § 1983 ..... *passim*

O.C.G.A. § 5-6-10 11

O.C.G.A. § 9-11-60(h) 11

OTHER AUTHORITIES

K. Sullivan and G. Gunther, Constitutional Law 13 (15th ed. 2004) 2

http://www.ajc.com/news/georgia-schools-ban-seclusion-566901.html 25

http://www.gadoe.org/pea_board.aspx?folderID=46242&m=links&ft=2010 25

http://www.gainesvilletimes.com/archives/29701/ 25

http://www.usatoday.com/news/education/2010-02-26-school-discipline_N.htm 25

INTRODUCTION

Petitioners brought this lawsuit in the Superior Court of Hall County, Georgia.[1] Respondent Pioneer Regional Educational Service Agency ("Pioneer") is the only defendant remaining in this case and was the only defendant potentially subject to suit under 42 U.S.C. § 1983.[2] Petitioners litigated the section 1983 component of this case **solely** under *Monell v. City Dept. of Social Services*, 436 U.S. 658 (1978). As will be demonstrated, Petitioners failed to introduce any evidence to satisfy the strict proof requirements necessary to establish *Monell* liability against Pioneer. These deficiencies were so numerous and so glaring that the trial court and the Court of Appeals of Georgia had multiple, legally sufficient grounds to support the grant of summary judgment. Each of these case dispositive grounds is analytically independent from the rationale of *City of Los Angeles*

---

[1] R-1-30. Citations to "R" are to the record on appeal in the Court of Appeals of Georgia. Citations to "App." are to Respondent's Appendix to this Brief and citations to "Pet. App." are to Petitioners' Appendix.

[2] Petitioners also named the Alpine Psychoeducational Program ("Alpine") as a section 1983 defendant. The trial court dismissed this claim. Because Alpine is not a governmental entity subject to suit under Georgia law, it is not subject to suit under *Monell*. Petitioners did **not** appeal Alpine's dismissal. *King v. Pioneer Reg'l Educ. Serv. Agency*, 301 Ga. App. 547, 551, n.4, 688 S.E.2d 7, 12, n.4 (2009). This is more than a technical point. Trial counsel in state court erroneously assumed that the acts and omissions of Alpine as a program could be imputed to Pioneer under *Monell* using a species of respondeat superior liability.

v. Heller, 475 U.S. 796 (1986) – the case on which the present Petition depends. Petitioners essentially invite this Court to write an "*obiter* dissertation" on *Heller*.[3]

The Petition should be denied for three reasons:

(1) Both the trial court and Court of Appeals held that under *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), Pioneer did not have an affirmative duty to protect Jonathan against self-harm because it did not have the kind of "special" or "custodial" relationship with him that might give rise to such a duty.[4] Although Petitioners raised the affirmative duty issue in their petition for certiorari to the Supreme Court of Georgia, they did

---

[3] K. Sullivan and G. Gunther, Constitutional Law 13 (15th ed. 2004) (quoting Thomas Jefferson describing *Marbury v. Madison* as "merely an *obiter* dissertation of the Chief Justice.").

[4] The ten circuit courts of appeal that have considered this issue have unanimously concluded that mandatory school attendance does not create an affirmative duty to protect students from third party harm. *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 568 (11th Cir. 1997); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999); *Priester v. Lowndes County*, 354 F.3d 414 (5th Cir. 2004); *Stevenson ex rel. Stevenson v. Martin County Bd. of Educ.*, 3 Fed. Appx. 25 (4th Cir. 2001); *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *Smith v. Guilford Bd. of Educ.*, 226 Fed. Appx. 58 (2d Cir. 2007); *Hasenfus v. LaJeunesse*, 175 F.3d 68 (1st Cir. 1999).

not include this question in the petition now before the Court. Under Georgia's law of the case doctrine, an independent state ground, Respondent is entitled to the entry of final judgment below without reaching the *Heller* question posed by Petitioners.

(2) Petitioners failed to develop or introduce **any** evidence, **expert or otherwise**, to prove that Pioneer committed a constitutional violation or that if such a violation occurred, it could be imputed to Pioneer under **any** theory of liability recognized under *Monell v. City Dept. of Social Services*, 436 U.S. 658 (1978) and its progeny. Under Georgia's right for any reason doctrine, Respondent would be entitled to the entry of final judgment below on this ground as well, again without reaching the *Heller* question posed by Petitioners.

(3) The Georgia Court of Appeals decision in this case – as the case was actually litigated in the state courts of Georgia – rests on a reading of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), that would be considered correct by this Court.

JURISDICTION

Respondent Pioneer agrees that the Court has jurisdiction to consider this petition for certiorari pursuant to 28 U.S.C. § 1257(a).

REASONS FOR DENIAL OF THE WRIT

Respondent takes issue with numerous aspects of the Petitioners' statement of the case that obscures more than it reveals about the circumstances surrounding Jonathan King's death. Instead of a lengthy counter-recitation of the facts, however, Respondent will note pertinent factual omissions and mischaracterizations in the course of discussing each ground for denial of the writ.

I. Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine

In repackaging this case, Petitioners gloss over important facts revealing how the section 1983 component of this case was actually litigated below. Contrary to what Petitioners say about the "gravamen" of their complaint,[5] the complaint does not mention, much less reflect any awareness, of the affirmative constitutional duty issue discussed in *DeShaney v.*

[5] Petition at 17 relating to gravamen of the complaint.

Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) and the several lower court cases addressing the *DeShaney* duty issue in the public school setting.[6] The complaint substantively (and incorrectly) rested on the Fourth Amendment to the U.S. Constitution; it invoked the Fourteenth Amendment apparently only insofar as that amendment makes the Fourth Amendment applicable to the states.[7] The complaint asserted that both Alpine and Pioneer were "persons" subject to suit under section 1983,[8] which was demonstrably wrong with respect to Alpine. Continuing this erroneous conflation of Alpine and Pioneer, the complaint challenged the constitutionality of Alpine's and Pioneer's policies and practices relating to the use of the timeout room[9] and suicide prevention and asserted that "their" employees were inadequately trained.[10] Finally, revealing Petitioners' misunderstanding of *Monell* principles, the complaint alleged that the actions of Jackson and Trotter – the two **paraprofessionals** directly involved in placing Jonathan in the timeout room and monitoring him – were "the actions of the **final policymaking authority** of Alpine and Pioneer" and they were "liable to

---

[6] *See supra* n.4.

[7] R-21-23.

[8] R-20, ¶ 28.

[9] This room is also referred to as a "seclusion room," but throughout this brief the room will be generally referred to as the "timeout" room.

[10] R-20-22, ¶¶ 30-32.

Plaintiffs **for the actions of Jackson and Trotter** and all damages and injuries flowing therefrom."[11]

After noting that Alpine was not a proper defendant in this case,[12] Respondent raised the issue of affirmative constitutional duty with respect to Pioneer in the first section of its opening brief in support of summary judgment.[13] In response, Petitioners acknowledged that this was the threshold issue in the case.[14] They also recognized that no circuit court case had ever found an affirmative constitutional duty based on *DeShaney* in the public school setting.[15] To overcome this analytical hurdle, Petitioners insisted that the timeout room was the legal equivalent of involuntary confinement in a prison, jail or mental health facility[16] – a position that no court had taken up to that time and no court has taken to date.[17]

---

[11] R-22, ¶ 34 (emphasis added).

[12] In its answer to the complaint, Respondent asserted as its "Seventh Defense" that Alpine lacked the capacity to be sued and was not a proper party. R-94.

[13] R-3318-3324.

[14] R-3555-3569. Without mentioning their erroneous reliance on the Fourth Amendment as the basis for *Monell* liability against Alpine and Pioneer, Petitioners invoked the protections of "substantive due process" under the Fourteenth Amendment. R-3555.

[15] R-3565, 3998-4011.

[16] R-3557-3565.

[17] Petitioners have not yet cited a single decision from any court at any level – state or federal – which has upheld a

(Continued on following page)

The trial court addressed the affirmative constitutional duty question directly. After finding that Alpine was not a proper section 1983 defendant,[18] it turned to the question of Pioneer's liability. The trial court observed that "[p]laintiffs have not provided legal authority from any jurisdiction that imposes an affirmative duty on a public school system to protect students from self-inflicted harm or harm by non-state actors even when a student is at school or on school property."[19] The trial court next discussed and explicitly rejected the Petitioners' prison/involuntary confinement rationale:

> [T]his Court finds that Defendants Pioneer and Alpine did not owe an affirmative duty to protect Jonathan from self-inflicted harm and further finds that a "special relationship" did not exist between Jonathan and Defendants Pioneer and Alpine such as those that arise with prison inmates, involuntarily committed mental patients, or arrestees. The Court **additionally** finds that Plaintiffs have failed to identify an official "policy, practice or custom" employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.[20]

---

challenge to the use of a seclusion, timeout or isolation room on any legal ground – constitutional, statutory or otherwise.

[18] Pet. App. at 30a.

[19] Pet. App. at 31a.

[20] Pet. App. at 35a (emphasis added).

As will be demonstrated, this paragraph reflects the undisturbed, binding law of the case under Georgia law.

On direct appeal to the Court of Appeals of Georgia, Petitioners briefed and argued affirmative constitutional duty under *DeShaney* as the threshold issue to be resolved before reaching the question of Pioneer's liability under *Monell*.[21] The Court of Appeals of Georgia framed the issues as follows:

> The Kings [Petitioners] contend that the trial court erred in granting summary judgment to Pioneer RESA as to their § 1983 claims. Specifically, they argue that questions of material fact remain as to whether Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan from harming himself **and** that such questions also remain as to whether Pioneer RESA's conduct, policies and employees demonstrated a deliberate indifference to that duty. **We disagree**.[22]

Petitioners now labor to evade the import of this paragraph.

---

[21] Brief of Appellants, 8-12; Reply Brief of Appellants, 3-8; Appellants' Post-Oral Argument Supplemental Brief, 1-4.

[22] *King*, 301 Ga. App. at 554, 688 S.E.2d at 14 (emphasis added).

They argue that the *DeShaney* affirmative duty issue remains open as a procedural matter under Georgia law, making the *Heller* circuit split question potentially subject to review in this Court. Bear in mind here that the trial court definitively rejected the Petitioners' affirmative duty argument and the Court of Appeals affirmed that judgment.[23] Still more to the point, the Court of Appeals rejected the Petitioners' affirmative duty argument based on Georgia's compulsory school attendance law and the contention that a student in the timeout room had the same legal status as "an incarcerated inmate or an involuntarily committed mental health patient. . . ."[24] Nevertheless, solely to reach and resolve the deliberate indifference issue as an alternative basis for the trial court's grant of summary judgment, the Court of Appeals **assumed** the existence of an affirmative constitutional duty[25] and went on to hold that Petitioners'

---

[23] As discussed in more detail *infra*, notes 29 and 30, appellate courts, including this Court, review judgments, not the analysis in opinions.

[24] *King*, 301 Ga. App. at 554, 688 S.E.2d at 14.

[25] Note the language of assumption used by the Court of Appeals: (a) "However, **even if** we accept the premise that sending Jonathan to the timeout room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student . . . " *Id.* 301 Ga. App. at 554, 688 S.E.2d at 14-15; and (b) "Accordingly, *even if* we were to conclude that Jonathan's confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights." *Id.* 301 Ga. App. at 555, 688 S.E.2d at 15.

evidence was still insufficient under *Monell* to generate a triable issue against Pioneer.[26] The Court did not say or suggest it was bypassing – or "dodging" as Petitioners describe it – the affirmative duty question in order to rely on *Heller* as a preferred ground for decision.

When Petitioners sought certiorari in the Supreme Court of Georgia, they understood that they had lost in the Court of Appeals on **both** grounds and that they had to prevail in the Supreme Court of Georgia on **both** or the case was over. Accordingly, they framed the affirmative duty and *Monell* issues as logically and legally interrelated exactly as the Court of Appeals had done:

> Whether Pioneer had an affirmative duty to protect Jonathan King that arose when its employees locked Jonathan in a concrete seclusion room and held him there against his will, **and** whether a reasonable jury could conclude that Pioneer violated that duty.[27]

The Supreme Court of Georgia denied certiorari, with all seven Justices concurring.

As this case presently stands, the trial court's unreversed rejection of Petitioners' affirmative duty argument represents a final, binding, case-dispositive

---

[26] 301 Ga. App. at 556, 688 S.E.2d at 15.

[27] Petition for Certiorari in Supreme Court of Georgia, at 9. (emphasis added).

decision under Georgia's law of the case doctrine.[28] For that reason, the issue is not open to relitigation below despite Petitioners' misleading suggestions to the contrary. Thus, to maintain the viability of the *Heller* question in this Court, Petitioners should have included the affirmative duty issue in their Petition for Certiorari here, as they did in both appellate courts of Georgia. This they did not do. Because Petitioners abandoned the affirmative duty issue here, Respondent is entitled to the entry of final judgment under Georgia law on that basis alone,[29]

---

[28] *See Leon v. Monterrey Mexican Restaurant of Wise, Inc.*, ___ S.E.2d ___, 2010 WL 2758599 at *2 (Ga. App., Jul. 14, 2010) ("Under our law, after remittitur of an appealed case is returned to the trial court by an appellate court with direction, 'the decision and direction shall be respected and carried into full effect in good faith **by the court below**.' O.C.G.A. § 5-6-10") (emphasis added); *Fulton-DeKalb Hosp. Auth. v. Walker*, 216 Ga. App. 786, 456 S.E.2d 97 (1995) ("O.C.G.A. § 9-11-60(h) provides that 'the law of the case rule is abolished; . . . provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings **in that case in the lower court** and in the Supreme Court or Court of Appeals as the case may be.' If the decision of an appellate court thereafter becomes 'incorrect' because the law changes – either because of subsequent case law or because of later-enacted statutes – it may not be binding precedent for other situations. However, **between the parties to the original decision**, it remains binding. . . . Any other practice would result in constant relitigation of issues as the law continually evolves.") (emphasis added).

[29] The Remittitur in this case was transmitted to the Superior Court of Hall County, Georgia on May 14, 2010 and filed there on May 17, 2010. It reads, "The case came before this court on appeal from the Superior Court of Hall County, it is

(Continued on following page)

no matter how this Court might be inclined to view Petitioners' suggestion of a relevant circuit split regarding *Heller*.

Although the law of the case doctrine in Georgia has not yet been applied to bar further litigation of the affirmative duty issue, it is a virtual certainty that it would apply based on the Remittitur transmitted to the trial court below. This procedural bar represents an independent state ground for dismissal of the Petitioners' case which weighs strongly against review of the superfluous *Heller* issue in this case. As this Court noted in *Zacchini v. Scripps Howard Broadcasting Co.*:

> If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted . . . for '(o)ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if that same judgment would be rendered by the state court **after** we corrected its views

---

considered and adjudged that THE JUDGMENT OF THE COURT BELOW BE AFFIRMED." App. at 5-6. The use of the term "judgment" rather than order, ruling or opinion below is significant. Under Georgia law, the grant of summary judgment is reviewed for error, not the analysis employed in the trial court. *Hunt v. Thomas*, 296 Ga. App. 505, 508, 675 S.E.2d 256, 259 (2009).

of federal laws, our review could amount to nothing more than an advisory opinion. (citations omitted)[30]

II. Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell.*

Reading the Petition now before this Court, one might think that, except for the *Heller* question, the Petitioners' evidence for *Monell* liability was

---

[30] 433 U.S. 562, 566 (1977) (emphasis added); *see also California v. Rooney*, 483 U.S. 307, 310 (1987) (certiorari improvidently granted in case in which State sought review in case that State won but opinion below contained undesirable analysis on a non-dispositive issue. "This Court 'reviews judgments, not statements in opinions . . . The fact that the Court of Appeals reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision. . . .") (citations omitted). *Cf. Stembridge v. State of Georgia*, 343 U.S. 541 547 (1952) ("At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment **might** have rested on a nonfederal ground, this Court will not take jurisdiction to review the judgment.") To be clear, Respondent recognizes that the application of Georgia's law of the case doctrine as an independent **state** ground bars relitigation of a **federal** claim under section 1983.

otherwise more than enough to warrant a jury trial.[31] That is not accurate. The trial court did not rely on or even cite *Heller* in granting summary judgment. In two separate places in its order, the trial court stated flatly that there was **no constitutional violation** of Jonathan's constitutional rights **flowing from** a "policy, practice or custom" attributable to Pioneer.[32] While *Heller* provided one ground for affirmance, it was not the only case dispositive ground available to the Court of Appeals of Georgia.

Under Georgia's right for any reason doctrine, the grant of summary judgment will be upheld on appeal as long as a proper legal basis exists in the record to support affirmance.[33] Georgia courts apply

---

[31] As a matter of fact, Petitioners actually litigated this case as though they could succeed based on vicarious liability. Despite occasional nods to *Monell*'s prohibition on respondeat superior liability, nearly all of their evidence attacked the acts and decision making of individual Alpine employees. Interestingly, too, their case against the Georgia Department of Education under Georgia's Tort Claims Act was largely predicated on attributing the conduct of Alpine employees to another entity that could not be sued under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

[32] Pet. App. at 36a, 42a.

[33] "[A]n appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *City of Gainesville v. Dodd*, 275 Ga. 834, 835, 573 S.E.2d 369, 337 (2002). *See also Abellera v. Williamson*, 274 Ga. 324, 327, 553 S.E.2d 806, 808 (2001) (holding that Court of Appeals should have applied right for any reason rule even when trial court made an error of law and did not address alternative grounds for summary judgment).

the same principle, especially in cases where summary judgment is granted and appellate review is *de novo*.[34] As this Court has recognized, appellate courts review the correctness of judgments, not the analysis in support of judgments.[35] Based on considerations of judicial economy, the right for any reason doctrine allows an appellate court to do what a trial judge could have done in the first instance. There were several valid grounds upon which the Georgia Court of Appeals could have affirmed the trial court's summary judgment. Any one of them would render Petitioners' argument for the writ based on *Heller* superfluous. Collectively, these grounds constitute a substantial **prudential** justification for denial of the writ.

A. Petitioners Failed to Prove that Pioneer Was Administratively Responsible Under *Monell* for Any Policy, Custom or Practice in Effect in the Alpine Program

Petitioners filed their section 1983 claim on the erroneous legal premise that Alpine and Pioneer were "synonymous"[36] for the purpose of *Monell* liability. In their view, the acts and omissions of Alpine could be

---

[34] *Id.*

[35] *See* notes 29 and 30 and accompanying text.

[36] R-4023.

imputed to Pioneer as a matter of law[37] – a species of respondeat superior liability as suggested earlier.[38] Trial counsel below were familiar with the legal status and organizational structure of Regional Educational Service Agencies in Georgia, having previously litigated *N. Ga. Reg'l Educ. Serv. Agency v. Weaver*, 272 Ga. 289, 291, 527 S.E.2d 864, 866 (2000) (describing a RESA in Georgia as "more closely akin to local school systems.").[39] Respondent gave immediate notice that the administrative and operational relationship between Alpine and Pioneer (or lack thereof) would be the major determinant of section 1983 liability.[40] Petitioners paid no attention to this subject until after discovery had ended and Respondent had filed a motion for summary judgment which, among other things, requested dismissal of the case against Alpine as an improper party.[41]

Petitioners' initial reaction was to trivialize the question of Alpine's party status: "Pioneer contends that it is the proper party defendant in this action

---

[37] "The Alpine Psychoeducational Program (hereinafter "Alpine") is an agency which is a part of Pioneer." R-20, ¶ 4; R-20-23, ¶¶ 28-35.

[38] *See supra* note 2.

[39] The complaint even included a citation to *Weaver* for the incorrect proposition that Alpine was a "person" properly subject to suit under section 1983. R-20, ¶ 28.

[40] Respondent's Answer stated, "'Defendant' Alpine Psychoeducational Program is **not** a legal entity capable of being sued." R-94 (emphasis added).

[41] R-3310 at n.1.

and that Alpine is not a separate entity that is subject to suit. Without accepting that position, **Plaintiffs will treat Pioneer and Alpine as one in the same** for the purposes of this motion."[42] After Respondent cited cases definitively establishing that suit against Alpine could not be maintained under section 1983,[43] Petitioners raged about "Defendants' penchant for intentionally and evasively confusing its own name and entity status in an effort to escape accountability"[44] and how "Defendants do their best to distinguish, disown and disavow Pioneer from Alpine, **as if they were separate entities,** with Alpine being a non-entity unanswerable to law or any court."[45] They likened *Monell's* exacting requirements to a "shell game."[46]

At the summary judgment stage, however, the evidence was closed. There was one fundamental problem. Because of Petitioners' fixation on Alpine as a program as being "synonymous" with Pioneer, the record was devoid of evidence addressing the necessary elements for *Monell* liability against Pioneer,

---

[42] R-3544 at n.2 (emphasis added).

[43] R-3975.

[44] R-4020.

[45] *Id.* (emphasis added).

[46] R-4021.

the only defendant potentially subject to such liability left in the case.[47]

In existence since 1976, Pioneer is part of "a statewide network of regional educational service agencies that were established to provide various shared services to local school systems."[48] Pioneer has administrative responsibility for programs in a thirteen county area in Northeast Georgia. It is the functional equivalent of a local school district under Georgia law.[49] It is governed by a "board of control" consisting primarily of school superintendents from each of these counties. One of its administrative responsibilities is to serve as the fiscal agent for programs in its territory. Alpine is one such program – the functional equivalent of a neighborhood school. As a part of the Georgia Psychoeducational Network, it provides educational services for students with severe emotional behavior disorders.[50]

Despite *Monell's* well-established evidentiary requirements, there is literally not a shred of proof that the Pioneer board had ever initiated, approved or reviewed a policy or practice at Alpine concerning (a) suicide prevention, (b) the use and monitoring of the timeout room or (c) the training of employees at

---

[47] The Petition ignores this failure of proof problem.

[48] *King*, 301 Ga. App. at 549, 688 S.E.2d at 11.

[49] *Id.*; *Weaver*, 272 Ga. at 291, 527 S.E.2d at 866.

[50] *Id.*

Alpine relating to either of the foregoing. There is also no such proof involving any other facility under Pioneer's jurisdiction. Nor is there evidence in the record identifying the members of Pioneers' governing board in 2004 or earlier or disclosing such operational facts as how often the board met, the items on meeting agendas, meeting minutes or information about how the board monitored the programs under its jurisdiction. If the Pioneer staff undertook any oversight functions on behalf of the board and made reports or recommendations on these subjects, Petitioners did not bother to uncover them. If by design, custom or practice Pioneer delegated policymaking authority to any officials in its thirteen county jurisdiction on these subjects, Petitioners never identified them as final policymakers for purposes of *Monell* liability.[51]

In the absence of some evidence that Pioneer was implicated in the formulation or enforcement of an unconstitutional policy, practice or custom that caused Jonathan's death, there simply can be no *Monell* liability against Pioneer. Petitioners assumed that Pioneer and Alpine were "synonymous" without the necessity of further proof; but *Monell* requires

---

[51] Despite alleging preposterously in their complaint that the two paraprofessionals were "final policymakers," Petitioners did not repeat that argument at summary judgment. Indeed, they never attempted to establish *Monell* liability with "final policymaker" evidence or argument at any time in this litigation as provided in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

affirmative proof of such a relationship and then proof of causation.

B. No Proof Pioneer Had Actual or Constructive Notice of Any Facts Indicating that Alpine Students Were At Risk of Suicide, that the Use and Monitoring of the Timeout Room Was Improper or that Alpine Employees Were Inadequately Trained

Petitioners' failure to establish the role of Pioneer's board of control or to identify an unconstitutional "policy, practice or custom" attributable to Pioneer might not have been fatal to their *Monell* claim, as this Court has recognized that in "limited circumstances" a local government entity may be liable under section 1983 for its failure to train its employees. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). And, some courts have recognized that the failure to have a policy at all might give rise to *Monell* liability.[52] But to succeed with this theory of liability, Petitioners would have had to show that the need for training or a policy was "so obvious" that failure to provide either could be characterized as "deliberate indifference" to constitutional rights. *City of Canton*, 489 U.S. at 390. Evidence of a pattern of

---

[52] *See, e.g., Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992).

prior unconstitutional conduct is generally required to meet this heightened standard of culpability.[53]

Petitioners had more than a year to conduct discovery. They had every opportunity to demonstrate a heightened risk of suicide at Alpine or at any other facility under Pioneer's thirteen county jurisdiction whether or not that alleged risk had anything to do with the use and monitoring of students in timeout rooms or whether the risk might be attributable to some other cause for which Pioneer might be held responsible under *Monell*. Bear in mind here that Petitioners sued the Georgia Department of Education for Jonathan's suicide as well. They could have developed evidence related to suicide risk and the use of timeout rooms on a statewide level but did not.

Petitioners did not find any such evidence even though Pioneer has been in existence since 1976. They could not and did **not** contradict Respondent's proof that over a period of nearly thirty years there had never been a single incident either at Alpine or any other program or facility within Pioneer's thirteen county jurisdiction, or at **any** psychoeducational program **throughout the state**, in which a student either committed suicide or even attempted suicide. In short, there was no evidence that Pioneer had actual or constructive knowledge of a pattern of

---

[53] *See, e.g.*, *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998); *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006); *West v. Tillman*, 496 F.3d 1321 (11th Cir. 2007).

student self-harm at Alpine or any other facility and had ignored that pattern to the point of deliberate indifference to the well-being of students in its programs.

There is certainly no evidence that Pioneer was aware of any case specific information about Jonathan individually. But, even if such knowledge could be imputed to Pioneer actually or constructively, it would not support Petitioners' *Monell* claim. As was the case with all of its students, Alpine maintained extensive records of Jonathan's educational and psychiatric background as well as his family social history. Even though Jonathan had previously made suicide threats, **no one** believed him to be suicidal including the professionals at Alpine or even the Petitioners, his parents, who, like Alpine employees, considered his threats to be manipulative behavior.[54] Indeed, a psychiatrist who evaluated Jonathan for self-injury thirty-five days before his death assessed him as "stable, safe and appropriate for discharge."[55] Alpine employees, one of whom had read this report just days before Jonathan's death, relied on this assessment in addition to their own knowledge about Jonathan based on their professional experience and

---

[54] R-3984-3985.

[55] 2nd Supp. Ind. R-79-81. (Jonathan was evaluated by the psychiatrist because he had been caught huffing gasoline. R-3747-3759)

training, having dealt with Jonathan intermittently for nearly two years.[56]

It is telling that Petitioners did not designate a single expert – educator, psychologist or psychiatrist – to challenge the validity of Alpine employees' assessment of Jonathan as non-suicidal or the competence of those who were involved in making it.[57] It is equally telling that Petitioners did not introduce any testimony – expert or otherwise – identifying the training that Alpine employees should have been given by Pioneer and explaining how that training would have prevented Jonathan's suicide. The record abundantly reflects that the employees at Alpine were experienced and adequately trained for the tasks they were asked to perform. Predicting human behavior is not an exact science.

C. No Proof That Jonathan's Death Was Due to a Constitutional Violation Committed by Alpine's Employees or Was Otherwise Caused by Pioneer's Deliberate Indifference

At least at the outset, one of the key elements of Petitioners' case was a broad constitutional attack on the concept and use of the timeout room as a part of a progressive discipline strategy. Apart from the *ex cathedra* assertions of Petitioners' trial counsel,

---

[56] R-1468-1476.

[57] *King*, 301 Ga. App. at 559, 688 S.E. 2d at 17, J. Adams, concurring.

the record in this case is bereft of any evidence that this strategy is unconstitutional on its face or as applied to Jonathan at Alpine. This argument holds true even if there were evidence that Pioneer had actual (not constructive) knowledge of every relevant fact **collectively** known to Alpine's employees on November 15, 2004. The litany of evidentiary shortcomings is significant.

First, Petitioners did **not** contradict Respondent's proof that Petitioners expressly authorized Alpine's use of the timeout room in connection with the formulation and approval of Jonathan's Individualized Education Program ("IEP"). Each student at Alpine has an IEP and, as one might expect, all address disciplinary issues since the program deals with children who have emotional and behavioral disorders. Jonathan was a voluntary participant in the Alpine program and could have been removed at any time by Petitioners, even during the school day while he was in the timeout room. Petitioners also had the right to observe Jonathan in the classroom setting and to review all of his educational records at Alpine, which would include records of Jonathan's placement in the timeout room. There is no written documentation reflecting Petitioners' dissatisfaction with any aspect of Jonathan's treatment at Alpine prior to November 15, 2004.[58]

Second, given the nature of Petitioners' challenge to the concept of the timeout room as a progressive

---

[58] 2nd Supp. Ind. R-206-209, 211-219.

discipline measure, one might have expected Petitioners to introduce expert testimony or professional studies criticizing the use of timeout rooms generally or suggesting that there was some statistically significant correlation between their use and a heightened risk of suicide. There is literally nothing to that effect in the record. In fact, Respondent documented that in 2004 the use of timeout or seclusion rooms was expressly authorized under Georgia law for persons who were **involuntarily committed** to mental health facilities[59] and was consistent with recognized educational practice nationally. Petitioners have been unable to cite a single case holding or even addressing the question whether the use of timeout rooms in any context – educational or otherwise – is unconstitutional. Even now, Petitioners do not make reference to such a case because the case does not exist.[60]

---

[59] App. at 3-4. Petitioners include a reference to a 2010 Department of Education regulatory change limiting the use of seclusion rooms in Georgia. That change was the result of a political campaign in which the Petitioners were actively and prominently involved, a fact that the Petition neglects to mention. *See* http://www.gadoe.org/pea_board.aspx?folderID=46242&m=links&ft=2010 – video of hearing before Georgia Department of Education, June 9, 2010; http://www.ajc.com/news/georgia-schools-ban-seclusion-566901.html; http://www.usatoday.com/news/education/2010-02-26-school-discipline_N.htm; http://www.gainesvilletimes.com/archives/29701/.

[60] When asked by the trial court to focus in a sur-reply brief on "your one main federal case that you would argue creates an opportunity for you to pursue this action under an alleged violation of 42 U.S.C. § 1983" [Transcript of July 9, 2008 proceedings before Judge Fuller, p. 73], Petitioners cited to *Hope v.*

(Continued on following page)

Third, Petitioners do not dispute here that Jonathan's disruptive behavior and assault on a fellow student justified some protective intervention on the part of Alpine's staff. They consistently gloss over inconvenient facts relating to the staff's assessment of Jonathan as non-suicidal, notwithstanding his threats. As previously discussed, those facts include the assessments of not only other psychiatric professionals, but also his parents. Both the trial court and the Court of Appeals of Georgia gave great weight to this background information in their analysis of Petitioners' *Monell* claim.[61] Although this assessment turned out to be wrong, it is difficult to understand how anyone could be faulted for it either in the Alpine program or at Pioneer.[62]

Pelzer, 536 U.S. 730 (2002) and argued that some conduct is so outrageous that no precedent is necessary to find it to be unconstitutional. R-3999.

[61] *King*, 301 Ga. App. at 449-550, 559-560; 688 S.E.2d at 11-12, 17-18; Pet. App. 38a-40a.

[62] Despite Petitioners' assertions to the contrary, Alpine had a policy and practice relating to the circulation of reports to staff of suicidal ideations by students. Apart from Alpine staff testimony about the procedure used to inform the staff psychologist and parents of any suicide threats, the question in this case was whether Jonathan's suicide threats were seen as credible. As previously noted, no one believed that they were, including Jonathan's parents and every prior treating psychiatrist or psychologist known to them. To the extent that some members of the Alpine staff were unaware that Jonathan had made suicide threats, the reason was that these threats were believed to be acts of manipulation.

Fourth, Petitioners did **not** contradict Pioneer's evidence that Alpine's procedure for monitoring students in the timeout room[63] was consistent with recognized practice in Georgia and nationally not only in the educational setting at Alpine but also in jails, prisons and mental health institutions even when a person is considered to be **actively suicidal.**[64] When a student was placed in the timeout room at Alpine, someone was seated outside the door to maintain verbal contact with the student, to visually monitor the student every fifteen minutes, and to document

---

[63] App. at 1-2.

[64] *See, e.g., Gish v. Thomas*, 516 F.3d 952, 955 (11th Cir. 2008) (recognizing monitoring every 15 minutes); *Dolihite v. Maughon By and Through Videon*, 74 F.3d 1027, 1043 n.28 (11th Cir. 1996) (reversing **denial** of summary judgment in § 1983 action as to all defendants except one **individual**); *Corley v. Northcoast Behavioral Healthcare Sys.*, 2004 WL 2521294 at *2-3 (Ohio Ct.Cl. Oct. 6, 2004) (15 minute monitoring noted as standard practice); *Whitt v. Stephens County*, 236 Fed. Appx. 900 (5th Cir. 2007) (every 30 minutes); *Yellow Horse v. Pennington County*, 225 F.3d 923, 928-929 (8th Cir. 2000) (every 30 minutes); *Miranda v. Fulton-DeKalb Hosp. Auth.*, 284 Ga. App. 203, 204, 644 S.E.2d 164, 166 (2007) (failure to monitor suicidal patient continuously, instead of monitoring every 15 minutes, held **not** to be cause of patient's suicide); *Brandvain v. Ridgeview Institute, Inc.*, 188 Ga. App. 106, 111, 372 S.E.2d 265, 269 (1988) (grant of judgment n.o.v. for Ridgeview reversed in medical malpractice action in part because Ridgeview staff *failed* to implement 15 minute checks of patient at risk of suicide; checks were part of Ridgeview suicide prevention policy). In neither of the two Georgia cases did plaintiffs argue that monitoring suicidal patients every 15 minutes was negligent in itself.

the entire interaction.[65] This is exactly the procedure followed for Jonathan on the day of his death.[66] Petitioners have not cited a single case holding that **continuous visual monitoring** is required for **involuntarily confined persons** who might be a suicide risk or who are considered to be actively suicidal.[67] Finally, the procedure contemplated that any "hazardous articles" should be taken from the student.[68] Petitioners think that a more specific definition of "hazardous articles" would have made a constitutionally significant difference in this case. But as is true of all of their attacks on Alpine's policies and procedures, they do not point to a single case supporting this proposition. Indeed, Petitioners did not tender a single example of an alternative formulation of this or a similar term that might have changed the outcome for Jonathan. None of Georgia's Department of Human Resources regulations relating to seclusion rooms gives a specific definition of "hazardous article."[69] In this case, the Alpine paraprofessional, Jackson, consciously applied the timeout procedure when he asked Jonathan whether there would be a problem keeping the macramé belt to hold

---

[65] The written procedure and documentation used is reproduced at App. 7-9.

[66] R-554-555, 557, 3429-3430, 3433, 3435-3436, 3448-3451, 3453-3456.

[67] Thus, even if one were to accept Petitioners' premise that putting Jonathan in the timeout room was equivalent to putting someone in jail, their *Monell* claim would still fail.

[68] App. at 7.

[69] App. at 3-4.

up his pants. And when Jonathan said no, Jackson had reason to believe him, based on his familiarity with Jonathan. Neither Jackson's decision about the macramé belt nor the Alpine procedure under which he acted reflects deliberate indifference to Jonathan's well-being.

III. Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) Should Not Be Reached by this Court; In Any Event, the Court of Appeals of Georgia Did Not Misapply *Heller* on this Record.

There were and are multiple, case dispositive alternative grounds for upholding the trial court's grant of summary judgment below. However intriguing the *Heller* circuit split issue might be as an intellectual exercise, resolution of that split would have no ultimate effect on the outcome below on remand because of Georgia's law of the case and right for any reason doctrines. As this Court and Georgia courts recognize, the object of appellate review is the correctness of judgments, not necessarily the correctness of the analysis employed.[70] Petitioners ask for what in practical effect would be an advisory opinion from this Court.

Petitioners describe *Heller* as an "easy"[71] case and then distinguish it from the present case in a way

---

[70] *See infra* notes 29 and 30 and accompanying text.

[71] Pet. at 27.

that makes the *Heller* circuit split seem more relevant than it actually is. The key to a proper understanding of *Heller*, they reason, is the fact that the challenge to the Los Angeles excessive force policy turned on the alleged misconduct of a **single** police officer. Because the jury determined that the single officer did not commit a **constitutional violation**, it followed in *Heller* that there could be no *Monell* liability against the City of Los Angeles. The distinction that Petitioners make here is that even though no single official at Alpine violated Jonathan's constitutional rights, it is still possible for Pioneer to be held liable under *Monell* because the "combined actions" of several Alpine officials may have resulted in a constitutional violation.

Conspicuously absent from Petitioners' factual statement is a description of the litigation strategy actually utilized by trial counsel below. It sheds considerable light on *Heller*'s application in this case. Petitioners emphasize the distinction between the actions and judgments of **individual** Alpine employees – none of which they admit were unconstitutional – and their **collective effect** which they allege caused a violation of Jonathan's constitutional rights. Petitioners did not make this distinction below. Again and again, they quoted or cited the deposition testimony of Stanley Stover, Director of Alpine, to the effect that his employees, in dealing with Jonathan, had "faithfully and properly" executed

Alpine's policies and customs.[72] This comment became the centerpiece of their litigation strategy.

Petitioners asserted a direct evidentiary link between the "faithfully and properly" executed policies at Alpine and the **collective** actions of Alpine's employees.[73] In fact, after Alpine was dismissed as a defendant in this case neutralizing Petitioners' doctrinally spurious version of respondeat superior liability, the **only** proof of a constitutional violation remaining in the record was quite literally the **individual and collective actions** of Alpine's em-ployees. If neither **the individual nor the collective actions** of the Alpine employees were unconstitutional as Respondent contended and the trial court

---

[72] R-3543.

[73] *See, e.g.*, Plaintiffs' Post-Oral Argument Supplemental Brief and Response to Defendants' Reply Brief, at 15 ("By analogy, in this case, Alpine's own director admits that what occurred here was a **faithful execution** of Alpine's policies, procedures and customs.") (emphasis supplied); Brief of Appellants in Court of Appeals of Georgia, at 2 ("The school's director says that all of this was a **faithful execution of the school's policies and procedures**.") (emphasis in original); *Id.* at 16 ("Given Stover's testimony that allowing Jonathan to keep the rope was a **'faithful execution'** of Alpine's policies (Stover Dep., pp. 99-100), the **deliberate indifference** that resulted is no wonder.") (emphasis supplied); Petition for Writ of Certiorari in Supreme Court of Georgia, at 4 ("Stan Stover, Alpine's director, testified that Trotter and Jackson's actions on November 15, including their allowing Jonathan to take a rope into the seclusion room, represented a **faithful execution** of the school's policies and procedures.") (emphasis supplied).

expressly found,[74] it follows **on this record** that Alpine's "faithfully and properly" executed policies and procedures likewise could not be deemed unconstitutional. The core logic of *Heller* applies and Respondent believes that the result would be the **same** in every circuit on this record notwithstanding Petitioners' insistent on a circuit split. In the final analysis, trial counsel below invited this analytical approach and should not be allowed to disavow it here.[75]

CONCLUSION

This is a fact-intensive case in which the trial court correctly granted Respondent's motion for summary judgment. From the standpoint of proving a *Monell* violation, the case was a muddle in conception

---

[74] Pet. at 36a. ("The Court additionally finds that Plaintiffs have failed to identify an official 'policy, practice or custom' employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.").

[75] *See, e.g., Estate of Amergi ex rel. Amergi v. Palestinian Authority*, 611 F.3d 1350, 1367 (11th Cir. 2010) ("Finally, the Amergis have admitted that it was they who first suggested the Rule 21 severance, and '[i]t is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.' "); *Adamson v. General Electric Co.*, 303 Ga. App. 741, 743, 694 S.E.2d 363, 367 (2010) ("Induced error is impermissible. . . . A party cannot claim error . . . where he himself committed or invited the error. . . . [Cit.]") (citations omitted).

and execution. Even if a majority of this Court were to believe that *Heller* is an outlier decision in reasoning or result, the judgment of the trial court on remand would be affirmed under Georgia's law of the case and right for any reason doctrine. There is no compelling justification for the grant of the writ. Respondent respectfully requests that the writ be denied.

Respectfully submitted,

ALBERT M. PEARSON, III*
MORAITAKIS, KUSHEL, PEARSON & GARDNER
3445 Peachtree Road, Suite 425
Atlanta, Georgia 30326
(404) 261-0016
apearson@mkpglaw.com

PHILLIP L. HARTLEY
HARBEN, HARTLEY & HAWKINS, LLP
Wachovia Center, Suite 750
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
(770) 534-7341

HARRY W. BASSLER
CRIM & BASSLER
100 Galleria Parkway, Suite 1510
Atlanta, Georgia 30339
(770) 956-1813

Attorneys for Respondent
**Counsel of Record*

U.S. Department of Justice
National Institute of Corrections

Prison Suicide: An Overview and Guide to Prevention

(Table 2-1 follows at App. 2)

TABLE 2-1
SUICIDE PREVENTION PROTOCOLS WITHIN DEPARTMENTS OF CORRECTION

DOC	Prevention Policy	Training	Screening/ Assessment	Housing	Suicide Watch Levels (in minutes)	Inter-vention	Admin Review	Last Revision
Alabama				x	15			5193
Alaska		x	x		15, 30, 60			2/93
Arizona	x		x	x	10			8/89
Arkansas								
California	x	x	x	x	constant/ unspecified			no date
Colorado	x	x		x	30, 60			9/93
Connecticut	x	x	x	x	constant, 15			7/92
Delaware	x	x	x	x	15		x	7/93
District of Col.	x		x		15, 30, 60			6/93
Florida	a			x	constant, 15, 30			10/93
Georgia			x					1/91
Hawaii	x	x	x	x	constant, 15	x		2/93
Idaho	x		x					11/93
Illinois	x			x	10, 15			5/91
Indiana								
Iowa	x				15, 30			3/90
Kansas	x	x		x	10-15			3/93
Kentucky								
Louisiana	x	x	x	x	5-15			9/93
Maine		a	x		constant, 15			Draft/94
Maryland	x			x				2/92
Massachusetts			x	x				5/93
Michigan	x	x	x	x	10			12/91
Minnesota	x		x	x	15, 30			5/92
Mississippi	x			x	5			11/93
Missouri	x		x	x	15			6/92
Montana	x	x	x	x	15			5/93
Nebraska	x	a						12/93
Nevada	x	x	x	x	constant, 15			8/93
New Hampshire	x		x	x	15, 30, periodic			8/93
New Jersey	x				15			7/92
New Mexico	x			x	constant			1/92
New York		x		x	constant 5, 15			9/92
North Carolina	x	x	x	x	constant 15			7/93
North Dakota		x		x	15, 30			9/93
Ohio	x	x	x	x	5, 15			12/92
Oklahoma	x		x	x	15			5/92
Oregon	x	x	x	x	10-15			no date
Pennsylvania	x	x	x	x	constant, 15, 30			4/94
Rhode Island	x			x	15	x		4/88
South Carolina	x	x	x					3/86
South Dakota	x	x	x		15		x	6/91
Tennessee	x	x		x				11/92
Texas	x			x	15			10193
Utah	x			a	15			2/94
Vermont	x		x	x	constant, 10-15			4/82
Virginia	x	x		x	constant, 15			2/92
Washington					constant, 15			6/84
West Virginia	x				15			5/87
Wisconsin				x	15			4/90
Wyoming		x			constant, 15			10192
Federal Bureau of Prisons	x		x					4/90

DHR Program	"Seclusion" Defined	"Time Out" Defined	"Seclusion Room" Reasons for Use	Monitoring Required	Removal Harmful Objects
Child Caring Institutions	Involuntary confinement in room; "imminent" threat to self or others. **290-2-5-.03(dd)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate child. **290-2-5-.03(ff)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-2-5-.14(2)(p)**	Yes. Visual through viewing window; every 15 minutes; log kept. **290-2-5-.14 (2)(p)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . ." to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-2-7-.14(2)(p)**
Outdoor Child Caring	Involuntary confinement in room; 'imminent" threat to self or others. **290-2-7-.01(ee)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate child. **290-2-7-.01(ii)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-2-7-.09(2)(p)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-2-7-.09(2)(p)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-2-7-.09(2)9p)**
Drug Abuse Treatment & Education (Adults)	Involuntary confinement in room "imminent" threat to self or others. **290-4-2.03(v)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate client. **290-4-2.03(z)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-4-2.26(2)(q)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-4-2.26(q)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-4-2.26(2)(q)**

DHR Program	"Seclusion" Defined	"Time Out" Defined	"Seclusion Room" Reasons for Use	Monitoring Required	Removal Harmful Objects
Residential Mental Health Facilities for Children & Youth	Involuntary confinement in room; "imminent" threat to self or others. **290-4-4.02(dd)**	Behavior management tool; restricts patient to designated area; to deescalate and to regain self-control. **290-4-4.02(hh)**	If patient exhibits dangerous conduct threatening immediate harm to self or others. **290-4-4.07(2)(j)**	Yes. Visual through viewing window; *no* time specified for frequency of monitoring; log kept **290-4-4.07 (2)(j)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . ." to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-4-4.07(2)(j)**
Foster Care Services	Involuntary confinement in room; "imminent" threat to self or others. **290-9-2-.01(ii)**	Behavior management tool; brief separation of child from group, not to exceed 20 minutes; deescalate child's emotionally charged condition. **290-9-2-.01(kk)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-9-2.07(8)(d)(15)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-9-2.07(8)(d)(15)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-9-2.07(8)(d)(15)**
Adoption	Involuntary confinement in room; "imminent" threat to self or others. **290-9-2-.01(ii)**	Behavior management tool; brief separation of child from group, not to exceed 20 minutes; deescalate child's emotionally charged condition. **290-9-2-.01(kk)**	Use limited time period "appropriate" to child's age, intelligence, emotional makeup and previous experience. **290-9-2-.06(c)(2)(x)**	Yes. To extent "necessary to insure child's safety and well/being." **290-9-2-.06(c)(2)(x)**	Seclusion not allowed in "room or area which may reasonably be expected to cause physical or emotion damage to the child." Harmful items *not* listed or further defined. **290-9-2-.06(c)(2)(ix)**

REMITTITUR

Court of Appeals
of the State of Georgia

ATLANTA, NOVEMBER 05, 2009

The Court of Appeals having met, the following judgment was rendered:

COURT OF APPEALS CASE NO. A09A1567
DONALD LEE KING ET AL V. PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY ET AL

This case came before this court on appeal from the SUPERIOR Court of HALL county; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

BLACKBURN, P.J., AND DOYLE, J., CONCUR. ADAMS, J., CONCURS SPECIALLY.

LC NUMBERS: 2006CV3323

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, **MAY 14, 2010**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

/s/ William L. Martin, III

Court of Appeals Cost $300.00 O.C.G.A. Sec. 5-6-10. No costs are payable to the Court of Appeals.

ALPINE Program

Instructions for the Time-Out / Seclusion Documentation Form

1. Place the student's name and date on the top line.
2. Write the TIME the Time-Out/Seclusion was initiated and the name of the staff member that initiated the seclusion.
3. In the "Reason for Time-Out/Seclusion" describe the behavior necessitating the time-out/seclusion.
4. Search the student for hazardous articles before secluding. Staff member performing the search should initial the box.
5. Place Appropriate CODES in the corresponding time slots and initial.
6. Note any abnormalities on student BEFORE and AFTER the time-out/seclusion and document (note scratches, bruises, etc.) If there were no abnormalities please write N.A. in that box.
7. Write the TIME the Time-Out/Seclusion was discontinued and the name of the staff member monitoring at that time.
8. Submit a copy of this DOCUMENT FORM to Judy within 1 school day.

9. Keep original in notebook provided at time out.

10. If student is physically escorted, restrained during search procedures or for any reason, if student is injured or staff is injured or struck by student, an Incident Form must be filled out and turned in to Judy that day.

ALPINE Program
Time Out/Seclusion
Documentation

Student Name: _____ Date: _____

Time initiated: _____ By: _____ | Check each student before secluding

Time Discontinued: _____ By: _____

Reason for Time Out/Seclusion: _____

Codes

Escalating

1. Beating on door
2. Yelling
3. Crying
4. Laughing
5. Singing
6. Mumbling
7. Pacing
8. Threatening
9. Combative
10. Cursing
11. Other:_____
12. Student Escorted physically to time out

De-Escalating

13. Standing Still
14. Lying or Sitting
15. Quiet
16. Sleeping
17. Verbally contract to control behavior
18. Identify out of control behavior
19. Not threatening
20. Can ID other options
21. Other: _____

Visual Checks Made on Student

Use codes listed at left to document behavior

7:30 AM		12:15 PM	
7:45 AM		12:30 PM	
8:00 AM		12:45 PM	
8:15 AM		1:00 PM	
8:30 AM		1:15 PM	
8:45 AM		1:30 PM	
9:00 AM		1:45 PM	
9:15 AM		2:00 PM	
9:30 AM		2:15 PM	
9:45 AM		2:30 PM	
10:00 AM		2:45 PM	
10:15 AM		3:00 PM	
10:30 AM		3:15 PM	
10:45 AM		3:30 PM	
11:00 AM		3:45 PM	
11:15 AM		4:00 PM	
11:30 AM		4:15 PM	
11:45 AM		4:30 PM	
Noon		4:45 PM	

Use the diagram on the right to note any injuries or bruises on the student both before and after the time-out/ seclusion and comment below.